for the drawing and accepting a check on a specified fund, known by the payee to be in existence, would indicate an assignment of part of the drawer's claim.[3] Where one draws generally, on the other hand, the facts would hardly indicate such an assignment of claim; the payee relies, not on the existence of a fund, but on the credit of the drawer. In both cases the payee gets a revocable order. But in the first case the order is good evidence of an equitable assignment, and in the second case it is not such evidence. The court must find the intention of the parties to assign a claim from the circumstances of the transaction, as well where it is the drawing of a check as where it is the simple, unmistakable assignment of a debt. It is in the intention of the parties that the assignment lies.

In all these cases, of course, the equitable remedy will be allowed only where the remedy at law fails. Thus where a check is drawn on a special fund, the drawer, if solvent, could stop payment without interference by a court of equity, for the payee would still have his remedy on the instrument. But when the drawer is bankrupt that remedy is inadequate, and equity will therefore protect the payee.

DUTY OF CARE BETWEEN CONFEDERATES IN ILLEGALITY. — If a plaintiff must show an illegal transaction in proving his case, the courts generally will not allow him to recover. This broad principle, however, has several recognized limitations. It applies only to negligent injuries, for the plaintiff's illegal act is no bar to his recovery for intentional harm.[1] Negligent injuries, however, may be of two kinds. They may result from the negligence either of a stranger to the illegal transaction, or of a confederate in illegality. In the former case, generally speaking, if the illegal act is a mere condition, not a cause of the injury, the plaintiff is not barred.[2] In the latter case, the weight of authority seems to hold that the courts will not enforce any duty of care between confederates in illegality, independently of any question of causation.[3] This rule was strictly applied in a recent North Carolina case. An editor, travelling on a pass, was injured by the railroad's negligence. A statute made it criminal to issue such a pass, and imposed a fine upon all companies which did so. The court held that the editor, being a party to an illegal transaction, could not recover. *McNeill* v. *Durham & C. R. Co.*, 44 S. E. Rep. 34. This result of the rule seems unjust for two reasons. First, even admitting the rule to be sound, the parties in the present case are not equally culpable, and the decision protects the chief offender. On this point some courts hold that where the illegality of the transaction is statutory, and the penalty imposed only on one party, the other is not *in pari delicto*, and is not barred.[4] That is the case here, and such a limitation seems more just than the general rule followed by the court. Second, the rule itself is open to objection. It seems unfair that a defendant should always escape liability

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[3] See Ketchum *v.* St. Louis, 101 U. S. 306.

[1] Welch *v.* Wesson, 6 Gray (Mass.) 505.

[2] Sutton *v.* Wauwatosa, 29 Wis. 21.

[3] Hegarty *v.* Shine, L. R. 4 Irish 288; Gilmore *v.* Fuller, 198 Ill. 130. But *contra*, Gross *v.* Miller, 93 Ia. 72.

[4] Tracy *v.* Talmadge, 14 N. Y. 162, and cases cited. Atlas Bank *v.* Nahant Bank, 44 Mass. 581, at p. 587.

when he is a confederate in illegality, although when he is innocent he escapes only when the plaintiff's illegality is a cause of the injury. The law-breaking defendant should not be treated more leniently than the law-abiding one, yet that is the effect of this rule. It would be more just to apply the test of causation in all cases, whether the defendant be a stranger or a confederate.

The rule on which the case in question was decided may also be attacked on a broader ground. The basis of all these rules is supposed to be public policy. The courts say they will not grant redress to a man who must come before them as an admitted wrongdoer. It seems just that a wrongdoer whose wrongful act is a cause of the injury, should be barred. When, however, the law goes farther, and denies a plaintiff redress simply because he and the man who injured him were engaged at the time in a violation of law, it seems to be using the civil law for punitive purposes. Nor is there any sufficient reason for creating an exception to the general rule that all citizens shall have access to the courts. On the whole, therefore, the rule is deemed to have no real basis in public policy. The attitude of the Iowa court,[5] which refuses to recognize any such rule, seems more commendable.

RIGHT TO SUE AS A CONSTITUTIONAL PRIVILEGE. — The Supreme Court of the United States has several times said, by way of *dictum*, that Art. 4, § 2 of the Constitution, providing that "a citizen of one state shall be entitled to the privileges and immunities of citizens in other states," protects the right of a citizen of one state to maintain actions of every kind in the courts of another.[1] The Supreme Court has never actually decided the point; but its *dicta* have been made the basis of two decisions[2] that a court may never refuse to retain jurisdiction on account of a plaintiff's non-residence. On the other hand these *dicta* are tacitly rejected by a recent New York case. The plaintiff was injured in Connecticut by the defendant's automobile. Both parties residing in Connecticut, the New York court refused to retain jurisdiction. *Collard* v. *Beach*, 81 N. Y. App. Div. 582.

The question which has occasioned this conflict is also involved in a consideration of the constitutionality of the statutory provisions in New York and other code states restricting actions by non-residents against foreign corporations. The courts of New York[3] and South Carolina[4] have overruled objections to the constitutionality of such provisions on the short ground that they discriminate, not between citizens and aliens, but between residents and non-residents. This argument, if sound, would also support the principal case. Its soundness depends upon whether in the statutory provisions in question residence is used in the sense merely of continuous bodily presence. The word may rightly be interpreted in this popular, rather than in its legal, sense in statutes whose object is to provide a substi-

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[5] Gross *v.* Miller, *supra.*

[1] See Ward *v.* Maryland, 12 Wall. (U. S.) 418, 430; Miller, J., in Slaughter-house Cases, 16 Wall. (U. S.) 36, 76, quoting Washington, J., in Corfield *v.* Coryell, 4 Wash. (U. S., C. C.) 371, 380.

[2] Cofrode *v.* Gartner, 79 Mich 332; Eingartner *v.* Ill. Steel Co, 94 Wis. 70.

[3] Robinson *v.* Oceanic Steam Nav. Co., 112 N. Y. 315.

[4] Central R. R. Co. *v.* Georgia, etc., Co., 32 S. C. 319.